(1) Supreme Court, U.S.
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IN THE

United States Supreme Court

OCTOBER TERM, 2003

TED HERRING,

Petitioner,

v.

JAMES V. CROSBY, JR., Secretary, Department of Corrections, State of Florida, BRADLEY D. CARTER, Warden, Union Correctional Institution, CHARLES CRIST, Attorney General, State of Florida,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

1. Where the factual findings necessary for a criminal defendant to be eligible for the penalty of death under state law are made by the trial judge rather than by the jury, and the jury provides only a non-unanimous "advisory" recommendation of death and makes no factual findings, does the defendant's death sentence satisfy the Sixth and Fourteenth Amendments of the United States Constitution as construed in *Ring v. Arizona*, 536 U.S. 584 (2002)?

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STATEMENT OF THE BASIS FOR JURISDICTION

This petition (the "petition") seeks a writ of certorari with respect to the Supreme Court of Florida's December 10, 2003 order denying the petition of Ted Herring ("Herring" or "petitioner") pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100 for a writ of habeas corpus vacating his death sentence. The order is reported at *Herring v. Crosby*, 862 So. 2d 727 (Fla. 2003) and appears in the appendix to this petition.

The Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a) because it concerns a final judgment or decree rendered by the highest court of the State of Florida, draws into question the validity of a Florida statute on the ground of it being repugnant to the United States Constitution, and claims a right, privilege, and immunity under the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the Sixth and Fourteenth Amendments to the United States Constitution, as well as §§ 775.082 and 921.141, Florida Statutes. The pertinent text of these authorities appears in the appendix to this petition.

STATEMENT OF THE CASE

On February 25, 1982, a jury convicted Herring of armed robbery and murder in the first degree in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida (the "trial court"). The penalty phase of

Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. The jury returned an advisory recommendation of death by an eight-to-four vote. The trial judge found four aggravating and two mitigating facts and sentenced Herring to death. Appendix ("App.") 12a-16a; *see also Herring v. State*, 446 So. 2d 1049, 1053 (Fla. 1984) ("*Herring I*").

The aggravating facts the trial judge found explicitly were: (1) Herring previously had been convicted of an unrelated robbery with a firearm; (2) the murder was committed while Herring was engaged in the commission of a robbery; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The mitigating facts that the trial judge found were that: (1) Herring had a difficult childhood and had learning disabilities; and (2) Herring was nineteen years old at the time of the crime. App. 12a-16a; *see also Herring I*, 446 So. 2d at 1053.

Herring appealed the judgment and sentence to the Supreme Court of Florida, which affirmed on February 2, 1984. *Herring I*, 446 So. 2d 1049. In the course of subsequent, post-conviction proceedings pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, the trial judge explained the true—and entirely improper—reason he found Herring eligible for the death penalty:

> The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch" [the trial judge's words, not Herring's]; robbed and shot the clerk.

> Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well.

State v. Herring, No. 81-1957-CC, slip. op. at 5-6 (Fla. Cir. Ct. July 24, 1985); *see also* App. 83a. The trial judge's written findings with respect to sentencing did not disclose that he relied on a "perjury aggravator" in finding Herring eligible for death. App. 11a-17a. Additional challenges to the constitutionality of Herring's death sentence (not relevant to this petition) are pending presently in the United States Court of Appeals for the Eleventh Circuit and the trial court.

On June 23, 2003, Herring filed a petition for a writ of habeas corpus pursuant to Rules 9.030(a)(3) and 9.100 of the Florida Rules of Appellate Procedure in the Supreme Court of Florida claiming that, in light of this Court's decision in *Ring*, his death sentence is in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution and under the Constitution and laws of the State of Florida. App. 43a. After briefing by Herring and the State of Florida, but without oral argument, the court denied Herring's petition on December 10, 2003. 862 So. 2d 727; *see also* App. 10a. The court did not provide an explanation for its decision. *Id.*

This Court has not yet addressed whether the Florida death eligibility statute is constitutional in light of Ring. The Supreme Court of Florida first addressed the constitutionality of Florida's death eligibility statute in the wake of *Ring* in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.) (*per curiam*), *cert. denied*, 537 U.S. 1070 (2002). There, the court held that it is for this Court to instruct Florida that its death eligibility statute violates *Ring* and that, in

the absence of such an instruction, the court would not vacate Bottoson's sentence. *See generally Bottoson*, 833 So. 2d 693.

Notwithstanding the court's *per curiam* ruling in *Bottoson*, the concurring opinions of individual justices expressed grave doubt that Florida law can be reconciled with this Court's decision in *Ring*. Chief Justice Anstead expressed "concerns that Florida's scheme may not comply with the Sixth Amendement as now construed in *Ring*" because the trial judge alone determines the existence of aggravating factors and thus makes the findings necessary for the death penalty to be imposed. *Id.* at 704-05. Similarly, Justice Pariente wrote that "*Ring* does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme" because, among other things, "[t]he jury does not *find[ ]* specific aggravating factors. Thus, it is the jury that recommends a sentence and the judge who *finds* the specific aggravating factors." *Id.* at 719. In addition, Justice Shaw concluded that *Ring* "has a direct impact on Florida's capital sentencing statute" because Florida law requires a unanimous jury finding for any element of a criminal offense, and "[n]owhere in Florida [death eligibility] law is there a requirement that the finding of an aggravating circumstance must be unanimous." *Id.* at 717.

To date, neither this Court nor any federal court has (to petitioner's knowledge) issued a decision addressing explicitly the question of whether Florida's death eligibility statute survived *Ring*. The Supreme Court of Florida has thus far adhered to its *per curiam* decision in *Bottoson*—but not without dissent. *See, e.g., Butler v. State*, 842 So. 2d 817, 835 (Fla. 2003) (Pariente, J., dissenting in pertinent part); *see also id.* at 835 (Anstead, C.J., dissenting

in pertinent part); *id.* at 834 (Shaw, J., dissenting in pertinent part).

ARGUMENT

This petition presents gravely important questions of federal constitutional law arising out of this Court's decision in *Ring*. This Court has yet to decide these questions, and the Supreme Court of Florida has decided them in a way that conflicts with this Court's decision in *Ring*. Sup. Ct. R. 10(c). In addition, the Supreme Court of Florida has decided these questions in a way that conflicts with the decisions of other state courts of last resort. Sup. Ct. R. 10(b). The Court should grant this petition in order to resolve these conflicts.

I.

THE FLORIDA DEATH ELIGIBILITY STATUTE, AND THUS HERRING'S DEATH SENTENCE, CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN *RING*

A. The Florida Death Eligibility Statute and Thus Herring's Death Sentence, Violates the Sixth Amendment Because the Trial Judge, and Not the Jury, Makes the Factual Findings Necessary for Death Eligibility

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that "the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. Specifically, the

Court held that Arizona's death sentencing statute was unconstitutional because it assigned the fact finding necessary to put the defendant to death to the judge and not the jury. *Id.* at 609.

Florida's death sentencing statute—under which Herring was sentenced—suffers from precisely the same constitutional flaw. Like the Arizona statute addressed in *Ring*, Florida's statute provides specifically that the judge, and not the jury, makes the factual findings necessary to put a defendant to death. Fla. Stat. § 921.141. Moreover, this Court has held that under Florida law, the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Hildwin v. Florida*, 490 U.S. 638, 639 (1989).

In *Walton v. Arizona*, this Court held that for Sixth Amendment purposes the Florida statute is *indistinguishable* from the very statute this Court later struck down in Ring:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. *A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*

497 U.S. 639, 648 (1990) (emphasis added).

This conclusion is consistent with the Supreme Court of Florida's own decision in *Mills v. Moore*, 786 So. 2d 532

(Fla. 2001). In *Mills*, the court noted that, in *Walton*, this Court "addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Id.* at 536-37 (citation and footnote omitted). But in *Ring*, the Court *did* hold that the Sixth Amendment right (of jury findings for facts increasing the maximum punishment) recognized in *Apprendi v. N.J.*, 530 U.S. 466 (2000), extends to capital cases and *did* overrule *Walton*. Thus, as the Supreme Court of Florida conceded in *Mills*, if *Walton* is unconstitutional, so too is the Florida death eligibility statute.

The Florida courts have held repeatedly that a Florida jury's participation in the death eligibility determination is only advisory and that the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986) (The jury does not "bear[ ] the same degree of responsibility as that borne by a 'true sentencing jury.'"); *Odom v. State*, 403 So. 2d 936, 942 (Fla. 1981) (jury's role restricted to announcing "the judgment of the community as to whether the death penalty is appropriate"); *Johnson v. State*, 393 So. 2d 1069, 1074 (Fla. 1980) ("The function of the jury in the sentencing phase [*i.e.*, recommending] . . . is not the same as the function of the jury in the guilt phase [*i.e.*, fact finding]"); *accord Van Royal v. State*, 497 So. 2d 625, 628 (Fla. 1986); *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983); *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1997); *Grossman v. State*, 525 So. 2d 833, 840 (Fla. 1988); *Morton v. State*, 789 So. 2d 324, 333 (Fla. 2001). Or, as Justice Shaw

put it in *Combs v. State*, "the jury's recommendation is merely advisory [and] *not supported by findings of fact*." 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., concurring) (emphasis added).

In the proceedings below, respondents' principal argument was that "[i]n Florida, the determination of "death eligibility" is made at the guilt phase of a capital trial, not at the penalty phase, as is the Arizona practice." That position is contrary to the plain language of Florida law and finds no support in cases. Florida law provides that:

> A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five years before becoming eligible for parole *unless the proceedings held to determine sentence according to the procedure set forth in section 921.141 result in findings by the court that such a person shall be punished by death.*

Bottoson v. Moore, 833 So. 2d at 713 (quoting Fla. Stat. § 775.082(1) as it existed in 1979) (emphasis added). A capital felony conviction therefore does not constitute a finding that the defendant may be sentenced to death. Rather, the conviction allows for further proceedings where the trial court makes further factual "findings" as to the defendant's eligibility for death. Fla. Stat. § 921.141(2)(a) (setting procedure for "*Findings* in support of sentence of death") (emphasis added).

Justice Lewis explained in his *Bottoson* opinion that, "it is unmistakable that a death penalty cannot be imposed in Florida without a prior factual finding with regard to aggravating factors." 833 So. 2d at 725. Similarly, Justice

Pariente noted that "*the maximum penalty after a finding of guilt in Florida is life imprisonment. The death penalty for first-degree murder cannot be imposed unless and until additional factual findings are made as to the existence of aggravators that outweigh the mitigators—just as in Arizona.*" *Id.* at 722 (emphasis added). Nor can the State's position be reconciled with *Hildwin* where this Court found that under the Florida death eligibility statute, the trial judge makes the factual findings necessary for death eligibility, 490 U.S. at 639, or *Walton*, where this Court stated that "a Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." 497 U.S. at 648.

In addition, the state argued below that this Court's decision in *Ring* rested on a finding that the Court had misinterpreted Arizona law in deciding *Walton*. That also is incorrect. Nowhere in *Ring* did the Court suggest that it previously misinterpreted either Arizona or Florida law. On the contrary, the Court's descriptions of the Arizona scheme in *Walton* and *Ring* are substantively identical. What changed was not this Court's understanding of Arizona law but rather its interpretation of the Sixth Amendment. In *Walton* and *Hildwin*, the Court held that the Arizona and Florida death eligibility statutes, respectively, did not violate the Sixth Amendment because "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640-41. But in *Ring*, the Court explicitly overruled *Walton* and clearly abrogated *Hildwin* when it held that the "Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravat-

ing factor determination be entrusted to the jury." 536 U.S. at 597.

In addition to the clear conflict between Florida law and *Ring*, there is a split among states. As explained in detail in Point I.C., *infra*, the highest courts of Missouri, Colorado, and Nevada have struck down death sentences under *Ring* on the grounds presented here.

B. Even If the Presence of an Advisory Jury Were Sufficient to Comply with the Sixth Amendment, the Absence of Unanimity in the Jury's Recommendation and the Trial Judge's Reliance on an Uncharged Aggravator, Make Clear That Herring's Death Sentence is Unconstitutional

It is clear that some of the Justices of the Supreme Court of Florida believe that the Florida death eligibility statute survives *Ring* only because of the presence of the advisory jury. *See*, *e.g.*, *Bottoson*, 833 So. 2d at 701 (Quince, J. concurring) ("The basic premise of *Ring* has been fulfilled under the Florida statute. That is, the trial judge does not make the sentencing decision alone."). Indeed, that is the only conceivable basis to distinguish between the Arizona and Florida death eligibility statutes. For all of the reasons discussed previously, and, as this Court stated explicitly in *Walton*, that is a distinction without a difference.

Moreover, even assuming, *arguendo*, that it is jury participation that saves the Florida scheme, then such participation must conform to the requirements of the Florida Constitution and the United States Constitution as interpreted in *Ring* and *Apprendi*. As Justice Pariente recently explained, "*Ring*, considered in tandem with the jury-trial guarantee [requiring unanimity] in article I, section 22 of

the Florida Constitution" requires the reversal of a death sentence where the jury's recommendation is not unanimous. *Butler*, 842 So. 2d at 836.

Prior to *Apprendi* and *Ring*, the absence of unanimity did not appear to be a problem because the Court had not recognized a "Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Hildwin*, 490 U.S. at 640 (citations omitted). When this Court overruled that principle in *Apprendi*, and later *Ring*, jury unanimity became a *sine qua non* for death eligibility. *See Bottoson*, 833 So. 2d at 710 (Anstead, C.J., concurring) ("However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote . . . . This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in *Apprendi* and *Ring*.").

A full third of Herring's jury voted against death. The recommendation of so deeply divided a panel simply cannot serve as the basis for death eligibility in light of *Ring*. As Justice Scalia explained, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610. Thus, under *Ring*, the predicates for death must be found by the jury, and, under Florida law, the jury must be unanimous. Fla. Const. art. I, § 22; *accord Jones v. State*, 92 So. 2d 261 (Fla. 1956); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (key principal of American criminal justice system is that defendant's

guilt will be "determined beyond a reasonable doubt by the *unanimous vote of 12 of his fellow citizens*") (emphasis added). Because Herring's panel was divided eight to four, his death sentence violated his right under the Florida and United States constitutions to unanimous jury findings beyond a reasonable doubt on all facts necessary to sentence him to death.

Even further assuming, *arguendo*, that unanimity is not required, death eligibility obviously cannot be based on facts the jury was not instructed to consider. Here, the trial judge has admitted that the basis of *his* decision to impose death was not the recommendation of the jury but rather *his* conclusion that Herring committed perjury. App. 83a. None of the trial court's instructions to the jury advised them that perjury was an appropriate consideration in determining either guilt or the appropriate sentence because it obviously was an improper consideration. App. 23a-26a. Nor would it have been an appropriate consideration if charged since it does not appear in the death eligibility statute.

Thus, even if in its formulation the Florida scheme provides for the judge and jury to decide death eligibility *together*, there is conclusive factual evidence that here, the trial judge decided the issue *alone*. The jury was not told that perjury was a relevant consideration, and assuming, as one must, that the jury adhered faithfully to the court's instructions, there was no jury consideration of Herring's alleged perjury. Accordingly, Herring was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to have the jury determine all of the factual predicates to his death sentence.

C. Herring's Robbery Conviction Alone Did Not Make Him Death-Eligible Under Florida Law and Thus Does Not Validate His Sentence Under *Ring*

As noted previously, among the aggravators found in this case was Herring's contemporaneous robbery conviction. In its post-*Bottoson* opinions, the Supreme Court of Florida has suggested that the presence of such a conviction may preclude relief under *Ring*. *See*, *e.g.*, *Banks v. State*, 842 So. 2d 788, 793 (Fla. 2003). In substance, the Supreme Court of Florida's rationale for rejecting *Ring* claims by petitioners with contemporaneous felony convictions appears to be that, because a jury has found the commission of such a felony unanimously and beyond a reasonable doubt during the guilt phase, the jury has also, by definition, found an aggravator sufficient for death eligibility. This misapprehends the Florida statute and this Court's decision in *Ring*.

Applying this exception ignores *Ring*'s requirement that the jury make every factual finding necessary to impose death. *Ring*, 536 U.S. at 597. Unlike states where the finding of a single aggravator renders a defendant death-eligible, the Florida statute makes clear that a series of independent factual findings are necessary to impose death. Specifically, the Florida statute requires a factual finding of (a) "sufficient aggravating circumstances;" and (b) "insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141. In other words, the fact-finder's role does not end when it determines that an aggravator exists. It must also make a factual determination as to whether the aggravators are "sufficient." If the aggravators are sufficient, the fact-finder then must make

factual findings as to any applicable mitigating circumstances. Once that is done, the fact-finder must make a determination as to whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

Accordingly, the fact that the jury has made the predicate factual finding for a violent felony aggravator does not strip the defendant of his right to have the jury determine whether the aggravator is "sufficient," nor does it deprive the defendant of his right to have the jury determine (i) whether mitigating circumstances are present; and (ii) if so, whether those circumstances are sufficient to outweigh the aggravators. Here, there is no dispute that the trial court, and not the jury, made the factual finding that Herring's aggravators were "sufficient" and made all of the factual findings with respect to mitigating circumstances. As such, Herring's conviction violates *Ring* regardless of whether the jury found a contemporaneous violent felony. Nothing in *Ring* is to the contrary.

This interpretation is consistent with Nevada's interpretation of its own, similar death penalty statute. As the Supreme Court of Nevada has explained:

> Nevada statutory law requires two distinct findings to render a defendant death—eligible: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). This second finding regarding mitigating circumstances is necessary to authorize the death penalty in Nevada, and we conclude that it is

> in part a factual determination, not merely discretionary weighing.

Johnson v. State, 59 P.3d 450, 460 (Nev. 2002); *cf. Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—[they] must be found by the jury beyond a reasonable doubt").

Similarly, on remand after the Court's decision in *Ring*, the Supreme Court of Arizona clarified that "Arizona's statutes require *more than* the presence of one or more statutorily defined aggravating factors . . . [and] the *trier of fact* must determine whether mitigating circumstances call for leniency." *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003) (emphasis added). A system whereby the jury determines the aggravator (*i.e.*, a prior felony), and the judge makes factual findings as to the sufficiency of aggravating or mitigating circumstances, cannot satisfy *Ring*.

The Supreme Court of Missouri also is in accord with the highest courts of Nevada and Arizona—and in conflict with the Supreme Court of Florida—on this question. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003) (*en banc*). Missouri determines death eligibility in four steps. Step 1 requires "the trier of fact to find the presence of one or more statutory aggravating factors." 107 S.W.3d at 258-59. Step 2 requires the trier of fact to "find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty." *Id.* at 259. Step 3 requires a determination of "whether the evidence in mitigation outweighs the evidence in aggravation." *Id.* Step 4 requires the trier of fact to "declare the punishment at life imprisonment if it decides under all of the circumstances

not to assess and declare the punishment of death." *Id.* at 261.

Like Herring, Whitfield, had a related felony conviction, and the Missouri court held that it did not violate the Sixth and Fourteenth Amendments as construed in *Ring* for the trial judge to find a related-conviction aggravator because such a finding necessarily rested on an earlier jury determination. *Id.* at 263. However, the Missouri court held that it *did* violate *Ring* for the trial judge to determine whether the aggravator was "sufficient" (Step 2). *Id.* Missouri's Step 2 is substantively identical to the requirement under the Florida statute that a related-felony aggravator not only be found to have occurred but also be found "sufficient." Similarly, in *Woldt v. People*, 64 P.3d 256 (Colo. 2003) (*en banc*), the Supreme Court of Colorado declared Woldt's death sentence unconstitutional under Colorado's own four-step death eligibility statute notwithstanding the presence of a contemporaneous felony aggravator because the trial judge, rather than the jury, made the factual finding as to the "sufficiency" of the aggravator. *See generally* 64 P.3d 256. In addition, in *State v. Fetterly*, 52 P.3d 874 (Idaho 2002), the Supreme Court of Idaho reversed a death sentence under *Ring* notwithstanding the jury-determined presence of a contemporaneous felony aggravator.

Accordingly, consistent with *Ring* and the post-*Ring* decisions of the Nevada, Arizona, Missouri, Colorado, and Idaho supreme courts, the mere fact of Herring's prior and contemporaneous felony convictions did not permit the trial judge to make the additional factual findings necessary to impose death. In addition, while the courts of certain jurisdictions (post-*Ring*) have permitted the judge to decide whether to impose death after considering facts

found by the jury, *see Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002), *cert. denied*, 124 S. Ct. 430 (2003), and *Oken v. State*, 835 A.2d 1105, 1152 (Md. 2003), that is not how the Florida statute is designed or functions. In Florida, as discussed previously, the trial judge, and not the jury, makes the threshold determinations for death eligibility. *See also Smith v. State*, No. SC01-2103, 2004 WL 178582, at *14-15 (Fla. Jan. 29, 2004) (clearly distinguishing decision to impose death from fact finding necessary to determine death eligibility). In any event, to the extent the decisions of additional states are in conflict with *Ring* and the decisions of the highest courts of Nevada, Arizona, Missouri, Colorado, and Idaho, that is all the more reason to grant this petition.

D. The Court Need Not Address Retroactivity in Considering the Petition

The Court need not address retroactivity in considering this petition. Herring's petition for a writ of habeas corpus to the Supreme Court of Florida was governed by the test for determining retroactivity under Florida law, which is set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). A change in law, according to *Witt*, applies retroactively in post-conviction capital proceedings when "the change: (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.* at 931.

Ring easily satisfies each of these requirements. *First*, it was decided by this Court. *Second*, it is constitutional in nature. *Third*, there can be no question that it constitutes a development of fundamental significance. The right to trial

by jury in a capital proceeding is perhaps the most sacrosanct right in our system of justice. As Justice Shaw explained in his concurring opinion in *Bottoson*, *Ring* "is of 'fundamental significance,' for its purpose is to safeguard the basic protections guaranteed by the right to trial by jury." 833 So. 2d at 717. As Justice Shaw also pointed out, prior to *Ring*, the Supreme Court of Florida repeatedly has applied significant capital sentencing decisions retroactively. *Id.* at 717 n.50 (citing cases). In addition, in all of the reported cases raising *Ring* claims, the Supreme Court of Florida addressed the claim on its merits. There is no reason to believe that Supreme Court of Florida deviated from that approach in Herring's case.

Accordingly, it is respectfully submitted that the appropriate procedure under these circumstances is to grant certiorari on the question of whether Herring's death sentence violated *Ring*, and, if the decision below is reversed, remand to the Supreme Court of Florida for a determination of whether *Ring* is retroactive under *Witt*. Petitioner is aware that this Court granted a writ of certorari in *Schriro v. Summerlin*, 124 S. Ct. 833 (2003), apparently to resolve a circuit split on the question of whether *Ring* applies retroactively in federal collateral proceedings. In *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2002), the Ninth Circuit held that *Ring* should be applied retroactively in federal collateral proceedings. The *Witt* standard clearly is more generous to defendants than the federal standard set forth in *Teague v. Lane*, 489 U.S. 288 (1989). Indeed, the Witt test is closely akin to the former federal test set forth in *Stovall v. Denno*, 388 U.S. 293 (1967), which was drastically narrowed in *Teague*.

Of course, if *Ring* is held to apply retroactively in *Summerlin*, that will be binding on the Supreme Court of Florida because, as is axiomatic, state courts cannot provide *less* constitutional protection than the federal constitution does. *Cal. v. Ramos*, 463 U.S. 992, 993 (1983) (*en banc*) ("States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."); *Johnson v. State*, 384 U.S. 719, 733 (1966) (States may "apply [new constitutional] standards in a broader range of cases than is required" by the federal courts.). On the other hand, even if the Ninth Circuit is reversed in *Summerlin*, remand for determination under *Witt* still will be necessary. *See, e.g., Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 297-98 (1987) (deciding federal constitutional question raised by appellants and remanding to Pennsylvania Supreme Court to consider retroactivity under state law).

CONCLUSION

For all of foregoing reasons, petitioner respectfully requests that the Court grant certiorari review.

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Respectfully submitted,

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